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IN THE
SUPREME COURT OF THE UNITED STATES

RODAK, JR., CLERK

October Term, 1977

No. 76-1369

PENNSYLVANIA TRANSFER COMPANY
OF PHILADELPHIA, INC., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT**

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TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provision Involved	2
Statement of the Case	3
Argument	5
Reasons for Granting the Writ	7
Conclusion	24

TABLE OF CITATIONS

Cases:

Alexander v. American United, 416 U.S. 752 (1974)	20, 21, 22
Asphalt Industries, Inc. v. C.I.R. 384 F.2d 229 (3d Cir. 1967)	17
Bob Jones University v. Simon, 416 U.S. 725 (1974)	19, 21, 22
Commissioner v. Sunnen, 333 U.S. 591 (1948)	12, 13
Cromwell v. County of Sac., 94 U.S. 351 (1876)	13, 14
Detwiler v. United States, 406 F. Supp. 695 (1975) ..	17, 18
Enoch v. Williams Packing Co., 370 U.S. 1 (1961)	7, 16, 19, 21
Miller v. Nut Margarine Co., 284 U.S. 498 (1932)	15, 16, 21

TABLE OF CITATIONS—(Continued)

Cases:	Page
Pennsylvania Transfer Company of Philadelphia, Inc. v. Whinston, 337 F. Supp. 122 (E.D. Pa. 1972) and Pennsylvania Transfer Company of Philadelphia, Inc. v. United States, 76-1 U.S.T.C. 9347	9
Ricardo v. Ambrose, 211 F.2d 212 (1954)	20
Rindskopf, 105 U.S. 418, 26 S.Ct. 1131	5, 20
Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974)	10
Statutes:	
Title 28 U.S.C. §1254(1)	2
Title 26 U.S.C. §7421(a)	3, 7, 15, 21, 23
Title 26 U.S.C. §7403(a)(b)(c)(d)	19
Constitutional Provision:	
U.S. Constitution, Fifth Amendment, Due Process	2

ADDENDUM

Addendum A	
Opinion and Order of District Court and Judgment	
Order of Court of Appeals	A1
Addendum B	
Statutes	A5

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No.

PHILADELPHIA TRANSFER COMPANY
OF PHILADELPHIA, INC., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

TO THE HONORABLE CHIEF JUSTICE AND
ASSOCIATE JUSTICES:

The Petitioner, Pennsylvania Transfer Company of Philadelphia, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment order of the United States Court of Appeals for the Third Circuit entered in those proceedings on January 7, 1977.

OPINION BELOW

The said judgment order states as follows:

"After consideration of all contentions raised by appellant, it is adjudged and ordered that the judgment of the District Court be and is hereby affirmed."

The District Court's opinion referred to by the Court of Appeals is reported at 76-1, U.S.T.C. 9347, filed March 23, 1976.

A copy of same appears at Addendum A, pp A1-A2.

JURISDICTION

The judgment order of the United States Court of Appeals for the Third Circuit was entered on January 7, 1977.

The jurisdiction of this Court is involved under Title 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Did the Court of Appeals clearly err in denying the appellant-petitioner's appeal?
2. Whether or not the District Court acted properly in dismissing this action based upon the doctrine of *res judicata* when the operative facts and the issues raised in the instant case are substantially different than those litigated in the prior action?
3. Whether or not the District Court acted properly in dismissing plaintiff-petitioner's complaint without any hearing on the merits where petitioner attacked the legality of the tax assessment and where petitioner sought to enjoin an improper confiscation of its property because of the absence of any alternative proceeding for petitioner to obtain a hearing on the merits?
4. Did not the District Court clearly err in not holding a hearing on the merits of plaintiff-petitioner's claim inasmuch as the Internal Revenue Service had served a notice of levy and seizure upon petitioner's property subsequent to its first opinion?
5. Did the lower court err by not giving petitioner all of its rights under the provisions of the Fifth Amendment as to Due Process?

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment V.

"No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

A. Course of Proceedings

This action was initiated by Pennsylvania Transfer Company of Philadelphia, Inc. against the United States of America seeking to enjoin the defendant from levying upon and seizing the plaintiff-petitioner's properties and monies and to immediately desist in attempting any such collections be it levies or seizures until a judicial hearing on the merits has been had as well as to have the tax assessments made against it declared invalid (R. 3a-7a). The defendant filed a 12B motion to dismiss the complaint based upon the following grounds: (1) that the court lacks jurisdiction over the subject matter by virtue of the doctrine of *res judicata*; and (2) that plaintiff-petitioner has failed to state a claim upon which relief can be granted (R. 18a). The plaintiff-petitioner filed an answer to the motion to dismiss alleging, *inter alia*, the inapplicability of the doctrine of *res judicata* as well as several claims upon which relief could be granted, including but not limited to the improper confiscation of the taxpayer's property under the guise of a tax, the statute of limitations which bar the assessments made in the instant case and because of the extraordinary circumstances jurisdiction invests in the District Court to enjoin collection of the tax because of the taxpayer's inability to contest the tax in any forum (R. 19a-21a).

Thereafter on March 21, 1976, the District Court entered a memorandum and order dismissing plaintiff-petitioner's complaint with prejudice based upon Section 7421(A) of the Internal Revenue Code and the doctrine of *res judicata* (R. 22a-24a) without a hearing on the merits. Then plaintiff-petitioner filed this appeal in this Honorable Court.

B. Statement of Facts

The Taxpayer, Pennsylvania Transfer Company of Philadelphia, filed its complaint with the District Court requesting the court to enjoin the Commissioner of Internal Revenue from levying upon, seizing and selling the taxpayer's property, to have the assessments against it declared null, void and invalid, and to secure the release of federal tax liens. The tax assessments were based upon the indictment and conviction of an officer-shareholder for fraud and embezzlement.

Of particular relevance because of the *res judicata* claim that is being made is the fact that petitioner instituted a similar action based upon similar but not identical facts. In that action as shown by the judgment order of the Third Court of Appeals (R. 99a), was the validity of waivers executed by delegates of the District Director. This case presents different facts upon which petitioner relies upon for relief, including the fact that that property has been seized by virtue of a levy.

The other factual circumstances that are significant for determination by this Court is the fact that the petitioner is unable to contest the assessment in any other forum. By virtue of pressure and coaching on the part of the Internal Revenue Service, the petitioner executed a Form 870 Waiver which precluded petitioner from proceeding in the Tax Court to determine the priority of the assessment. Moreover, because of the precarious financial situation of the petitioner, paying the tax and suing for a refund does not present a viable alternative. Thus, what petitioner seeks is an injunction to enjoin the collection of the tax so that it will have an opportunity to litigate the merits of that tax. If the injunction prayed for is not allowed, then the petitioner will be unconstitutionally deprived of his property because said property will be assessed and seized without the Internal Revenue Service meeting any of the due process safeguards that are dictated by our Constitution.

ARGUMENT

Petitioner submits to this Honorable Supreme Court of the United States that it has good, sufficient and important reasons for the granting of a writ of certiorari in the instant matter, lawful, and in all good conscience, justice, fairness and equity.

(a) The lower courts have decided important questions of federal law in a manner not intended by Congress.

(b) The lower courts have departed from the usual interpretations of the laws so as to call for an exercise of this Supreme Court's supervision.

(c) Such departures include the misinterpretation of the theory of *res judicata*, due process, and equal protection of the law, discrimination as to the allowance by the Government of its methods of tax collection procedures.

(d) All of which are greatly important to a great many of the taxpayers and citizens of the United States.

(e) The lower courts have failed to recognize and adhere to the Court's decision in the *Rindskopf* case, wherein this Court stated that an assessment can always be contested.

In the *Rindskopf* case, 105 U.S. 418 at 422, it is said:

" . . . The assessment of the Commissioner of Internal Revenue was only *prima facie* evidence of the amount due as taxes upon the spirits distilled between the date mentioned. It established a *prima facie* case of liability against the distiller, and nothing more. If not impeached, it was sufficient to justify a recovery; but every material fact upon which the liability was asserted was open to contestation . . . "

The evidence in our instant case, as to the basis of the assessments, was built up from the fraud allegations which have to be proved by the Commissioner with clear and

convincing evidence, which, apparently, is not available to it.

Further, it is very possible that petitioner will not receive sufficient funds from the condemnation proceedings to pay all of the taxes, fraud penalties and interest assessed against it. Also, if the Internal Revenue Service obtains the funds, it may allocate them to the years involved in such a manner that none of the individual year's deficiency will be paid, thereby restraining it from filing a claim for refund.

REASONS FOR GRANTING THE WRIT

1. The United States Court of Appeals for the Third Circuit Erred in Arbitrarily Dismissing the Petitioner's Appeal Based Only Upon What It Determined Had Transpired in the District Court; as Is More Carefully and Fully Set Forth in the Argument in Captions 2, 3 and 4.

The doctrine of *res judicata* was inappropriately applied by the District Court since this case raises operative facts and legal issues which are substantially different than those previously litigated in the prior action. In order for the doctrine of *res judicata* to be applicable, the subsequent action must be a repetitious suit involving the same cause of action. An inquiry must always be made as to the question of what was actually litigated and determined in the original action. It is submitted that based upon the new facts that are raised in petitioner's complaint and the absence of litigation on the merits of several of the issues contained in this action, the doctrine of *res judicata* was inappropriately applied in summary fashion by the District Court in dismissing petitioner's complaint.

Section 7421(A) does not operate as a bar to petitioner in the instant case. It is because the taxpayer here meets the guidelines that are set down in *Enoch v. Williams Packing*, 370 U.S. 1 (1961). Examination of the issue raised by the assessment shows that it was clearly illegal and of an arbitrary and capricious nature and one which the Government, even under the most liberal view, cannot hope to win. This coupled with the existence of other equitable factors, provides a sufficient basis upon which the District Court can exercise equitable jurisdiction by enjoining the tax.

Even if petitioner is unable to meet the rather strict standards that are set forth in *Williams Packing*, *supra*, it is submitted that this factual situation presents an ap-

propriate situation for the application of another exception to the Anti-Injunction Statute which not specifically delineated by the Supreme Court, was specifically characterized by it.

Due to its financial circumstances, petitioner is unable to pay the tax and sue for a refund. Since petitioner is foreclosed from proceeding for review in the Tax Court and is financially unable to assume the "pay now and sue later" refund route, the determination of whether or not this Court rules that it has jurisdiction is of utmost consequence to petitioner. Unlike previous actions that have been characterized by the courts, if petitioner's action is dismissed, it will never have a hearing on the merits.

Because of the extraordinary factual situation presented by petitioner, the absence of any other legal forum in which petitioner can assert its cause of action, and because of the judicial concern over the petitioner's due process, it is appropriate that equitable jurisdiction vest in the District Court to enjoin the collection of the tax. Without such jurisdiction, petitioner will be denied the fundamental hearing that is commensurate with the constitutional guarantee of due process. This additional exception, although not specifically authorized, is specifically alluded to by this Supreme Court and is appropriately applied in this factual situation.

Therefore, for all the foregoing reasons, it is specifically requested that the request for injunction be allowed and the decision of the Court of Appeals for the Third Circuit dismissing the complaint be reversed, as well as that of the District Court.

2. The Doctrine of Res Judicata Was Improperly Relied Upon by the District Court Since Both the Operative Facts and the Issues Raised Here, Are Substantially Different Than Those Previously Litigated.

The District Court, in dismissing this action, relies on the principle of *res judicata*. Without citation of any of

the alleged factual or legal similarities to the prior action and without discussion of the basis of its reasoning, the District Court nakedly concluded the following:

"Furthermore, as this is an apparent attempt to relitigate a cause of action earlier dismissed by this Court, the principle of *res judicata* is applicable." (Citations omitted—Opinion of District Court R. 23a).

An examination of the substantive elements for application of the doctrine of *res judicata* combined with a comparison of the factual and legal issues raised in this case as contrasted to those in the prior action¹ alluded to by the District Court, discloses that the District Court was in error when it applied this doctrine to bar petitioner from proceeding to a trial on the merits.

In a frequently cited law review article on this principle, Von Moschzisker, "Res Judicata" 38 Yale L.J. 299, the rule is articulated in the following fashion:

"Speaking broadly, the rule of *res judicata* means that when a court of competent jurisdiction has determined on its merits, a litigated cause, the judgment entered, until reversed, is forever and under all circumstances, final and conclusive as between the parties to their suit and to their privies, in respect to every fact which might properly be considered in reaching a judicial determining of the controversy, and in respect to all points of law there adjudged, as those points relate directly to the cause of action in litigation and affect the fund or other subject matter then before the court." (Von Moschzisker at 300).

However, in a recent Supreme Court case which cites a portion of the above-quoted definition, the Court appro-

1. *Pennsylvania Transfer Company of Philadelphia, Inc. v. Whinston*, 337 F. Supp. 122 (E.D. Pa. 1972), *aff'd*, 474 F.2d 1339 (3d Cir. 1973), *cert. denied*, 414 U.S. 832 (1973).

priately caveated the following limitation on this rather expansive definition:

"Res judicata operates only to bar repetitious suits involving the same cause of action." (*Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 578 (1974)).

Determination of whether or not the instant action is barred by the doctrine of *res judicata* depends upon the sometime difficult determination of whether or not this action is, as was stated by the Supreme Court in *Sea-Land, supra*, "a repetitious suit involving the same cause of action." It is respectfully submitted that although arising from a similar, *but not identical* factual situation, this case raises new legal issues which were not litigated in the prior suit. This suit also contains several other legal issues which were raised, but not litigated in the prior action. Therefore, *res judicata* is not applicable and petitioner should have the opportunity for a hearing on the merits.

In making the determination of what was actually litigated in the prior action, it is submitted that an appropriate place to start is the judgment order of the Third Circuit Court of Appeals with respect to that action. The following excerpt from that order provides key insight into the matter that was "before the Court" and "actually litigated":

"In this suit to enjoin the District Director of Internal Revenue from collecting taxes, and to have assessments declared invalid, appellant contends that waivers of the statute of limitations executed by him on IRS Form 656 were invalid because signed by a delegate of the District Director rather than personally. The district court rejected that contention and dismissed the complaint. Delegation Order No. 16, issued pursuant to Treasury Decision 6118, 1955-1 Cum. Bull. 698, 718-19 (22(b)), and Delegation Order No. 42, 1956-2 Cum. Bull. 1378, make it clear that the waivers are valid. (R. 99a).

Review of the above order and the opinion of the District Court *prima facie* shows that the validity of the waivers signed by petitioner was the only issue that was before the court and litigated in the prior action. Petitioner in its complaint in this action, does not raise the "waiver issue" but rather, raises several different issues which should be given the opportunity to be heard by the Court on their merits.

The most significant factual difference in the two actions is that at the time of the filing of the second complaint, the District Director had not only made an assessment, but he had filed a levy, thereby attaching and seizing the property of the taxpayer. The nature of the property seized is of an unique type since it is proceeds, some of which will ultimately be due the petitioner as a result of condemnation proceedings that are currently being litigated in the Court of Common Pleas of Philadelphia County to ascertain the amount of such proceeds that petitioner is entitled to. Secondly, the property levied upon is not only that of the petitioner, but in fact, several other owners and creditors have filed claims and put petitioner on notice of their rights to the proceeds from the condemnation proceeding. Aside from this substantial factual distinction between the two actions, there are several legal issues that are raised by this action which were not litigated in the prior proceedings. These legal issues can be further classified into two groups of issues; those asserted in the prior complaint, but not litigated and those which have been raised for the first time in this second action.

The first group would include, but not be limited to the following:

1. Whether or not the individual fraud of an officer and minority shareholder can result in a fraud assessment of deficiency against the corporate taxpayer.
2. Whether or not the statute of limitations had run with respect to the years upon which the District

Director based its deficiency assessment against the plaintiff.

Some of the issues that were first raised in this action and which were not previously litigated include, *inter alia*:

1. Whether or not a taxpayer has a right to bring an action to enjoin the collection of taxes after that property is already in the control of the government by virtue of its levy.
2. Whether or not a taxpayer has a right to bring an action against the government to enjoin it from seizing property based upon an assessment for unproved fraud penalties, as contrasted with an assessment for taxes.
3. Whether or not a taxpayer because of the competing interest of various creditors and other owners in the property seized has a right to bring an action to enjoin the collection of tax.
4. Whether or not a taxpayer who admittedly is unable to contest the tax in any other forum has a right to bring an action to question the propriety of the assessment made against the taxpayer.

It is the contention of the petitioner that since none of these issues have been litigated, it has the right to now litigate them without being barred by the prior action.

The leading Supreme Court case passing on the issue of *res judicata* in tax cases is *Commissioner v. Sunnen*, 333 U.S. 591 (1948). In *Sunnen*, the Supreme Court in viewing the troublesome question of "issues raised in a proceeding, but not litigated", therein stated, as follows:

"But where the second action between the same parties is upon a different cause or demand, the principle of *res judicata* is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to

those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' *Cromwell v. County of Sac*, supra., 353. And see *Russell v. Place*, 94 U.S. 606; *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48; *Mercoid Corp., v. Mid-Continent Co.*, 320 U.S. 661, 671. Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time." (Emphasis supplied, 333 U.S. at 598).

The above-cited language seems to be determinative of the first group of issues previously enumerated, those contained in the prior suit, but not actually litigated. Since these points were not at issue in the first proceeding, they cannot be deemed to have been "swallowed" by that action thereby precluding their adjudication in this action.

The second set of issues involve those which were not only not litigated in the prior action, but could not have been litigated since the facts are different here and were not before the Court or raised by either parties in that prior action. With respect to the issues that are contained in this class, the Supreme Court of the United States has stated the following:

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have

been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." (Emphasis supplied) *Cromwell v. County of Sac*, 94 U.S. 351 (1876).

When applied to this second class of issues, the doctrine of *res judicata* is clearly not applicable. As enunciated in *Cromwell*, *supra*, an inquiry must always be made as to the questions actually litigated and determined in the original action. Such an inquiry discloses that these issues were not only not litigated nor determined in the original action, but were not even raised.

The only issue that was actually litigated for *res judicata* or collateral estoppel purposes is that of the validity waiver signed by a delegate of the District Director. This is the only point which was addressed by the Third Circuit Court in its judgment order and the only issue actually dealt with on the merits, albeit, in a summary fashion. There was no discussion of the propriety of assessing the corporation for the fraud of its shareholder, nor was there any discussion or conclusiveness with respect to the several other issues that have been raised in this law suit.

It is respectfully submitted that based upon the new facts that are raised in petitioner's complaint and the absence of litigation on the merits on several issues that were contained in the first action, as well as the new issues raised in this action, the doctrine of *res judicata* was inappropriately applied in summary fashion by the District Court in dismissing petitioner complaint. Petitioner has raised several factual and legal issues that have not been litigated before a court of competent jurisdiction, and it is entitled, therefore, to have its day in court to litigate those issues on their merits.

3. The District Court's Dismissal of Petitioner's Complaint Was Improper Since §7421(a) Is Not a Bar to the Several Claims Upon Which Relief Can Be Granted Which Are Set Forth in Petitioner's Complaint.

Section 7421(a) Is Not a Bar to the District Court's Power to Enjoin Further Confiscation of the Taxpayer's Property Since the Tax Is Merely in the Guise of a Tax and the United States Cannot Establish Its Claim of Fraud Against the Corporation.

There can be no doubt that the general rule to be gleaned from §7421(a) of the Internal Revenue Code of 1954 is that the assessment of or collection of tax may not generally be restrained. However, as with all general rules and especially with one as prophylactic as this one, the courts have as a matter of equity engrafted judicial exceptions onto the statute in order to obviate the harsh results that would otherwise obtain. It is submitted that the factual situation presented by the instant case is so unconscionable and shocking to the judicial conscience of this Court that substantial justice requires that the arbitrary and capricious conduct of the Internal Revenue Service in making the assessments and levying upon the taxpayer be enjoined.

The genesis of this equitable exception to the "Anti-Injunction Statute" was *Miller v. Nut Margarine Co.*, 284 U.S. 498 (1932). In *Nut Margarine*, the Supreme Court allowed an injunction against collection of tax since:

"Enforcement of the act against respondent would be arbitrary and oppressive, would destroy its business, ruin it financially and inflict loss for which it would have no remedy at law." 284 U.S. at 510, 511.

In reliance upon the above language in *Nut Margarine*, *supra*, district courts sparingly allowed injunctions where the factual situations presented were extraordinary and

prompted the equitable conscience of the Court to enjoin the collection of the tax. The only showing required was that the taxpayer had no adequate remedy at law. This equitably orientated reading of *Nut Margarine, supra*, was followed consistently by the lower courts until *Enoch v. Williams Packing Co., supra*, was decided in 1961. In *Williams Packing, supra*, the Supreme Court stated that the aforementioned reading of *Nut Margarine* was in error and in order to enjoin collection of a tax, two elements must be present. By virtue of the decision in *Williams Packing*, the exercise of this type of equitable relief required not only a showing of irreparable injury, but also a showing that under the most liberal view of the law, the Government could not prevail.

It is submitted that the instant case presents an appropriate factual situation for injunctive relief since it satisfies even the rather harsh and inequitable test that is set forth in *Williams Packing, supra*.

The primary basis for the relief of the improper assessment made by the Internal Revenue Service, as disclosed in petitioner's complaint, is that the lawful lifetime of the assessments and liens have lapsed thereby prohibiting collection (Para. 15, petitioner's complaint, R. 6a), and the fact that the assessments and fraud penalties were based upon the embezzlement of an officer-minority shareholder and another officer who were convicted of same in the United States District Court for the Eastern District of Pennsylvania. Since the first issue regarding the statute of limitations raises several factual questions, under the holding in *Williams Packing*, the Government would have a chance to prevail and, therefore, it is not an appropriate ground for injunctive relief. However, as disclosed by the facts at the time of this suit, *Williams Packing* makes it clear that this is the frame of reference that must be applied, the same cannot be said for the assessment of taxes based upon the embezzlement by corporate officers.

The fact that the deficiency assessments made against the corporation were based upon the embezzlement and fraud by a minority taxpayer is without question. Examination of the indictments and other pertinent material attached to the complaint clearly discloses the direct relationship between the assessments and the conversion by the minority shareholder-officer. Equally as clear is the arbitrary and capricious action on the part of the Internal Revenue Service in assessing a tax deficiency and penalty against the corporation for the amount of funds embezzled by the corporate officer who was a minority shareholder, as well as adding a 50% fraud penalty to that alleged deficiency.

Dispositive of this issue is the case of *Asphalt Industries, Inc. v. C.I.R.*, 384 F.2d 229 (3d Cir. 1967). *Asphalt* clearly holds that unless there is knowledge by other officers and stockholders of the corporation of the fraud, the same cannot be imputed to the corporation itself and, therefore, no fraud deficiencies can be alleged nor assessed against said corporation. In the case at bar, attached to the complaint is the affidavit of Louise Lee who was one of the other shareholders and James Lee who signed the complaint was another of the shareholders. All these individuals deny any knowledge of the fraud by the convicted officer and their lack of conspiracy in same is evidenced by the absence of any indictments with respect to these individuals. Therefore, under the facts which were disclosed at the time this suit was instituted, the Government even under the most liberal view of the facts, cannot prevail. To conclude otherwise would be to inappropriately construe the first requirement for application of the exception set forth in *Williams Packing* in such a way that the exception itself would be vitiated. Having satisfied the first requirement, consideration of the need for equitable relief to be exercised by this Court is appropriate.

The allegations contained in petitioner's complaint which the Court must accept as face value. *Detwiler v.*

United States, 406 F. Supp. 695 (1975), discloses the "extraordinary circumstances" which warrant the exercise of equitable relief because of the inadequacy of a remedy at law.

The extraordinary circumstances that are disclosed in petitioner's complaint include, *inter alia*, the sale of assets of the corporation including state and inter-state commerce rights to meet its obligations, the seizure of funds being held for the benefit of petitioner with the Redevelopment Authority for purchase of real property upon which petitioner may operate its business, the financial ruination and destruction of petitioner's business causing a complete loss to its stockholders of all their lives' work, assets, savings and income; thereby resulting in irreparable harm, injury and damage to the petitioner. Furthermore, denial of the injunctive relief sought will preclude petitioner an opportunity to litigate the merits of the arbitrary and capricious assessments made by the Government, thereby amounting to a confiscation of property without due process of law and discriminatory process.

The taxpayer respectfully submits that it meets the requirements for exercise of equitable injunctive relief with respect to the improper and illegal assessments and, therefore, requests that such arbitrary and capricious assessments and the subsequent levies be enjoined thereby, precluding further irreparable injury to petitioner.

4. The Fact That the Property Was Already Levied Upon and Claims to That Property Have Been Asserted by Various Third Parties, Coupled with Petitioner's Inability to Contest the Tax in Any Forum, Presents Extraordinary Circumstances Which Vest the District Court With Power to Enjoin the Tax in Order to Assure the Petitioner Due Process.

The property that was levied upon by the Government are proceeds of a condemnation proceeding that are being

held in custodial legis by the Prothonotary of the Court of Common Pleas of Philadelphia County. These proceeds arose from the condemnation of petitioner's real property upon which it operated its business. The amount deposited was the "just compensation" determined by the Redevelopment Authority and the ultimate decision on the amount of the proceeds will be made by a jury verdict in Common Pleas Court. The actual seizure of the property by the Government was accomplished by virtue of a notice of levy attaching said monies and was served on the Prothonotary's office on or about April 24, 1972. It is the contention of the taxpayer that by virtue of this levy, this property is no longer, *per se*, in the hands of the taxpayer. Since an impliedly valid lien arose on behalf of the Government, the property is *de facto* in the possession of the United States, and the "Anti-Injunction Statute" does not act as a bar in the instant case.

Although primarily the property of the petitioner, there are other claims of third parties with respect to the attached monies. Other owners and creditors of the petitioner have filed liens and have noticed their claims and are asserting rights with respect to the same property attached by the Government. Since these other creditors of the petitioner could have instituted their own action which would not have been barred, there seems no reason why they could not be joined as parties to this action, thereby providing an appropriate forum for all the issues raised to be litigated under §7403, Title 26 U.S.C. (I.R.C. 1954). This unyielding quest of petitioner and judicial desire to find a forum to litigate the legal issues raised is the underlying basis for the unwritten exception to *Enoch*, *supra*, that is enunciated, albeit by innuendo, by the Supreme Court in *Bob Jones University v. Simon*, 416 U.S. 725 (1974).

This salient exception, although not expressly stated in *Bob Jones*, is a result of the Supreme Court's concern for the denial of due process to a taxpayer when denied the inherent right to a hearing on the merits of his claim. This

fundamental requirement of due process was clearly recognized by this Court in *Ricardo v. Ambrose*, 211 F.2d 212 (1954) where this Court stated the following:

"It is true, of course, that due process requires that at some stage before the tax becomes irrevocably fixed as a charge for a taxpayer's property, he must have an opportunity of which he shall have notice, to be heard as to the validity of the tax, the taxability of F.2d at 221.

No such opportunity to be heard was afforded the taxpayer in the instant case, and if relief is not granted by this Court, no such opportunity will ever exist. Thus, the taxpayer will be completely denied the due process to which he is entitled prior to the ultimate confiscation of his property. *Rindskopf*, 105 U.S. 418.

The fact that petitioner has no other forum in which to litigate its cause of action is disclosed by factual allegations appearing as of record in this case. Firstly, petitioner was denied a hearing before the tax court by virtue of pressure exerted by the service inducing it to sign a Form 870 waiver thereby, *de facto* denying taxpayer the opportunity to litigate his case in the tax court. Secondly, the financial circumstances of this company clearly demonstrate that the "pay now and sue later" route is, as a practical matter, unavailable to this taxpayer. The precarious financial position of this petitioner is clearly disclosed in the pleadings which aver that it is a trucking business that has been required in order to generate cash flow, to sell many of its assets including important intangibles such as, operating rights certified by the Public Utility Commission and Interstate Commerce Commission. This denial of due process, coupled with the extraordinary factual situation presented by petitioner warrant exercise of equitable jurisdiction as alluded to by the Supreme Court in both *Bob Jones*, *supra*, and *Alexander v. Americans United*, 416 U.S. 752 (1974).

The due process issue was raised in *Bob Jones* by the taxpayer on his allegation that forcing the taxpayer to meet the requirements of §7421(a) and *Williams Packing*, would deny it due process of law in light of the irreparable injury that would result pending resort to the alternative procedures for review of the Commissioner's decision. The Supreme Court in dismissing this line of reasoning held the following:

"The court dismissed at hand similar contentions nearly sixty years ago and we find such arraigning arguments no more compelling now than then.

"*This is not a case in which an agreed party has no access at all to judicial review.*

WERE THAT TRUE, OUR CONCLUSION MIGHT WELL BE DIFFERENT." (Emphasis supplied) 416 U.S. at 747.

Thus, it seems clear that the Supreme Court has engrafted an additional exception onto the prophylactic rule of §7421(a) and its sterile progeny, *Williams Packing*. What the Court has said is that in that most exceptional case where a petitioner is unable to meet the test of *Williams Packing*, but possesses the irreparable injury articulated in *Nut Margarine*, the Court will allow an injunction if the taxpayer has "no access at all to judicial review."

The existence of an "alternative legal remedy" was also an important determinative factor in the Supreme Court's ruling in *Alexander v. American United, Inc.*, 416 U.S. 754 (1974). Implicit in the *American United* decision in the United States Court of Appeals for the District of Columbia Circuit which allowed the injunction enjoining the collection of the tax, was its finding that the taxpayer was without:

". . . an adequate legal remedy in the form of adequate refund litigation . . ." 447 F.2d at 1180.

The Supreme Court in coming to the absolute opposite conclusion with respect to the availability of an alternative remedy, based its decision on its finding that:

"[And] respondent will have a full opportunity to litigate the legality of the Service's withdrawal of respondent's Section 501(c) (3) ruling letter in a refund suit following the payment of FUTA taxes." 416 U.S. at 762.

Thus, in the most recent Supreme Court cases dealing with the Anti-Injunction Statute, a pivotal factor in their determination was the availability of an alternative legal remedy, thereby, providing the taxpayer with the due process safeguards which are guaranteed by the Constitution of these United States. It is the absence of this alternative legal remedy, the exceptional circumstances presented by this taxpayer and the irreparable harm that will result if relief is not granted, which provides an appropriate basis upon which this Court can conclude that the factual situation presented here is of the nature specifically contemplated by the Supreme Court in *Bob Jones* and *American United*.

Because the failure to provide equitable relief to petitioner in the form of enjoining the collection of taxes will result in the unconstitutional confiscation of petitioner's property without meeting the requirements of due process, the action of the Third Circuit Court of Appeals in dismissing this case should be reversed with a direction to it to order the District Court of Appeals to order the District Court to proceed with an injunction hearing on the merits.

The doctrine of *res judicata* only acts as a bar to a subsequent action if that action is a repetitious suit involving a cause of action that was previously litigated. Where a second action between the same parties consists of different facts and legal issues are raised which were

not previously litigated in the prior action, a second suit on those new legal issues must be allowed. Therefore, it is respectfully submitted that since petitioner's complaint discloses facts different than those in the prior action and since petitioner has raised several legal issues which have not been previously litigated, the petitioner is entitled to a hearing on the merits since the issues it has raised were not previously litigated and *res judicata* cannot act as a bar.

The exclusion of *Williams Packing* does not apply to the facts of this case since the assessment was of an arbitrary and capricious nature in that the United States cannot establish its claim against the corporate taxpayer. Secondly, since the assessments include substantial fraud penalties that were made against the corporate petitioner, the District Court has jurisdiction to enjoin the collection of those criminal penalties. This is because the Anti-Injunction Act as a bar only against enjoining collection of taxes and not against the enjoining of the collection of fraud penalties of a nature that is sought in the instant case. Furthermore, since the property that is the subject of this action is *de facto* under the control of the United States, the District Court has jurisdiction to determine the propriety of the assessment without enjoining the collection of tax thereby avoiding any possible violation of §7421.

Finally, the constitutional safeguard of due process requires that the District Court have jurisdiction to determine the propriety of the assessment since the aggrieved petitioner taxpayer has no other access for judicial review. The absence of any available forum for the petitioner to litigate its dispute and the irreparable harm that will result if the assessment is not reviewed, clearly invokes the equitable jurisdiction of the federal courts to justifiably determine the validity of the petitioner's claims for relief by affording it a hearing on the merits.

5. The United States Court of Appeals for the Third Circuit Erred in Arbitrarily Dismissing Petitioner's Appeal Based Only Upon What It Determined Had Transpired in the District Court as Is Clearly Shown in the Foregoing Paragraphs 2, 3 and 4.

The orders of the lower courts violated requirements of both procedural and substantive due process of law under the Fifth Amendment to the Constitution of the United States; which are repugnant to the American sense of justice. Due process requires that a person be afforded a full, fair and impartial hearing to which he is entitled. Re: *Schlesinger's case*, 404 Pa. 582

CONCLUSION

For all of the foregoing reasons, Pennsylvania Transfer Company respectfully requests that this Honorable Court reverse the judgment of the Court of Appeals and of the District Court with directions to the District Court to proceed to a trial on the merits on the issues raised in petitioner's complaint.

That for the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari be granted.

Respectfully submitted,

MENDEL, SCHWARTZ & BOCK

By: M. Mark Mendel

Harris T. Bock

ROBERT M. TAYLOR

*Attorneys for Petitioner,
Pennsylvania Transfer Company
of Philadelphia, Inc.*

ADDENDUM A

**IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**PENNSYLVANIA TRANSFER COMPANY
OF PHILADELPHIA, INC.**

Civil Action

v.

UNITED STATES OF AMERICA

No. 75-1377

Memorandum and Order

Hannum, J.

March 23rd, 1976

Presently before the Court is defendant's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b). In the instant proceeding plaintiff seeks to enjoin defendant from levying upon and seizing plaintiff's property and further seeks to have tax assessments upon which the levy is based declared invalid.

In an earlier action instituted by plaintiff against the District Director of Internal Revenue at the time, Alfred L. Winston, which was before this Court, plaintiff sought identical relief based upon the same operative facts with which the Court is herein concerned. *Pennsylvania Transfer Company of Philadelphia, Inc. v. Winston*, 337 F.Supp. 122 (E.D. Pa. 1972), *aff'd* 474 F.2d 1339 (3d Cir. 1973), *cert. denied* 414 U.S. 832 (1973). In the earlier proceedings the Court dismissed the suit based, in part, on Title 26 United States Code §7421(a):

Upon the present state of the record it is not apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim. *Winston*, *supra* at 124.

A2

On reconsideration the Court finds that plaintiff has again failed to overcome the barrier of §7421(a), and for this reason the earlier decision of this Court obtains. *See, Enochs v. Williams Packing and Navigation Co.*, 370 U. S. 1 (1962); *Bob Jones University v. Simon, Secretary of the Treasury, et al.*, 416 U. S. 725 (1974).

Furthermore, as this is an apparent attempt to re-litigate a cause of action earlier dismissed by this Court, the principle of *res judicata* is applicable. *Gambocz v. Yelencsics*, 468 F.2d 837 (3d Cir. 1972); *Bruszewski v. United States*, 181 F.2d 419 (3d Cir. 1950).

For the foregoing reasons defendant's motion to dismiss with prejudice will be granted.

A3

[Caption Omitted in Printing]

Order

AND NOW, this 23rd day of March, 1976, it is ORDERED that defendant's motion to dismiss plaintiff's complaint with prejudice is GRANTED.

/s/

J.

A4

[Caption Omitted in Printing]

Submitted Under Third Circuit Rule 12(6)

January 6, 1977

Before: ALDISERT and WEIS, Circuit Judges, and KNOX,
District Judge.*

Judgment Order

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

/s/

Circuit Judge

Attest:

/s/

Thomas F. Quinn, Clerk

Dated: January 7, 1977
Certified as a true copy and issued in lieu of a formal mandate on January 31, 1977.

Costs taxed in favor of
appellee as follows:

Brief\$98.00

Test:

Thomas F. Quinn
Clerk, United States Court of Appeals
for the Third Circuit

* Honorable William W. Knox, of the United States District Court for the Western District of Pennsylvania, sitting by designation.

A5

ADDENDUM B

Statutes Involved

Title 28 U.S.C. §1340—Internal Revenue, Custom duties.

"The district court shall have original jurisdiction of any civil action arising under any Act of Congress providing for Internal Revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court. 6/25/48: C.646, 62 Stat. 932."

Title 28 U.S.C. §1291

"Final decisions of District Courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Title 28 U.S.C. §1254(1)

"Courts of Appeal; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree."

Title 26 U.S.C. Section 6331—Levy and Distraint.

"(a) Authority of Secretary or delegate.—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax

(and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property as is exempt under Section 6334 belonging to such person or on which there is a lien provided in this Chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in Section 3401(d) of such officer, employee or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this Section.

“(b) Seizure and sale of property.—The term “levy” as used in this title includes the power of distraint and seizure by any means. A levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

“(c) Successive seizures”

Title 26 U.S.C. §7421

“Prohibition of suits to restrain assessment or collection.

“(a) Tax.—Except as provided in Sections 6212(a) and (c), 6213(a), and 7426(a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax is assessed.”

Title 26 U.S.C. §7422

“Civil Actions for Refund.

“(a) No suit prior to filing claim shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of the law in that regard, and the regulation of the Secretary or his delegate established in pursuance thereof.”

Title 26 U.S.C. §7426

“Civil actions by persons other than taxpayers.

“(a) Actions permitted.

1. Wrongful levy.—If a levy has been made on property or property has been sold pursuant to a levy, any persons (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon, may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary or his delegate.”

Title 26 U.S.C. §7403—Internal Revenue Code of 1954

“Action to enforce lien or to subject property to payment of tax.

“(a) Filing.—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the

Secretary or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property of whatever nature, of the delinquent or in which he has any right, title or interest, to the payment of such tax or liability.

“(b) Parties.—All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

“(c) Adjudication and Decree.—The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States. If the property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of such lien with expenses of sale, as the Secretary or his delegate directs.

“(d) Receivership.—In any such proceeding, at the instance of the United States, the court may appoint a receiver to enforce the lien, or, upon certification by the Secretary or his delegate during the pendency of such proceedings that it is in the public interest, may appoint a receiver with all the powers of a receiver in equity.”

No. 76-1369

Supreme Court, U. S.
FILED
MAY 25 1977

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

PENNSYLVANIA TRANSFER COMPANY OF
PHILADELPHIA, INC., PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.,
*Solicitor General,
Department of Justice,
Washington, D.C. 20530.*

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1369

PENNSYLVANIA TRANSFER COMPANY OF
PHILADELPHIA, INC., PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

Petitioner seeks an injunction against the United States from levying upon its property, and a declaration that certain income tax assessments for 1951-1956 are invalid. The district court dismissed the suit on the ground of *res judicata* and the court of appeals affirmed.

In previous proceedings begun in 1972, petitioner brought suit against the District Director of Internal Revenue with respect to the same income taxes for 1951-1955, and related penalties and interest. *Pennsylvania Transfer Co. of Phila., Inc. v. Winston*, 337 F. Supp. 122 (E.D. Pa.), affirmed, 474 F. 2d 1339 (C.A. 3), certiorari denied, 414 U.S. 832. In the prior action, petitioner argued that it did not owe the taxes, that its waivers of the statute of limitations were void, that a threatened levy by the

Internal Revenue Service would irreparably injure it, and that any attempted collections by the Internal Revenue Service would be illegal (R. 31a, 34a-41a).¹

Petitioner makes virtually the same assertions and requests essentially the same relief in this action which it brought in 1975 (R. 4a-7a, 39a-40a). In the 1972 proceeding, the district court held that petitioner had failed to establish that its waiver of the statute of limitations was void, and had therefore failed to demonstrate that under no circumstances would the government prevail on the merits of its claim. *Enochs v. Williams Packing Co.*, 370 U.S. 1, 7. The court accordingly held that petitioner's suit was barred by the Anti-Injunction Act, 68A Stat. 876, 26 U.S.C. 7421(a), which prohibits actions to enjoin the assessment or collection of taxes (337 F. Supp. 122).

On the prior appeal, petitioner failed to challenge the district court's determination that the Anti-Injunction Act foreclosed its suit; the court of appeals affirmed the district court's ruling that petitioner's waivers of the statute of limitations were valid, and thus let the assessments stand (474 F. 2d 1339). In this proceeding, the district court likewise dismissed petitioner's complaint because it "failed to overcome the barrier of §7421(a)" and for the further reason that it was "an apparent attempt to relitigate a cause of action earlier dismissed by this Court [so that] the principle of *res judicata* is applicable" (Pet. A2).

The courts below correctly held that *res judicata* bars this suit because it involves the same tax assessments for the same taxable years, the same parties,² and the same basic

¹"R." refers to the record appendix filed in the court of appeals.

²The 1972 suit, although ostensibly against the District Director, was, by statutory mandate, actually against the United States. See 26 U.S.C. 7422(c).

relief as the 1972 suit. *Commissioner v. Sunnen*, 333 U.S. 591. Petitioner may not litigate the same cause of action again merely by setting forth new allegations.³ Under the principle of *res judicata*, a party is bound by a final judgment on a cause of action "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Commissioner v. Sunnen*, *supra*, 333 U.S. at 597, quoting from *Cromwell v. County of Sac*, 94 U.S. 351, 352.

The 1972 judgment conclusively determined that the facts asserted by the petitioner were insufficient to enjoin the levies which have since occurred. The fact that the levies were made after the 1972 litigation is irrelevant. The levies were the natural consequence of the earlier judgment.

It is immaterial that petitioner alleges in this second suit that it is not able to sue for a refund. The absence of any forum to litigate its tax liabilities is the result of its failure to file a timely claim for refund within two years after the filing of the waiver, the validity of which it unsuccessfully challenged in the 1972 proceedings. See 26 U.S.C. 6532(a). A taxpayer cannot voluntarily forego bringing a refund suit and thereafter claim he has no adequate remedy at law. See, e.g., *Commissioner v. "Americans United," Inc.*, 416 U.S. 752, 762 n. 13; *Graham v. duPont*, 262 U.S. 234.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MAY 1977.

³For example, petitioner now argues (Pet. 12) that an injunction is permitted where the assessment is based on "unproved fraud penalties."